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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1940.

No. 1030.

M. O. COWAN, D. C. WEBB and VICTOR KLEIN, Trustees Under the Plan and Agreement for Reopening the East Tennessee National Bank,

Petitioners,

vs.

HAMILTON NATIONAL BANK OF KNOXVILLE, as Trustee for the Estate of Hal S. Harris,

Respondent.

BRIEF AND ARGUMENT ON BEHALF OF RESPONDENT.

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To the Honorable the Supreme Court of the United States:

I.

OPINIONS OF THE COURT BELOW.

The opinion of the Supreme Court of Tennessee may be found in **146 S. W. (2d) 359**, but has not been officially reported. The opinion is found in the record (R. 70-85). The opinion on the petition to rehear is in the record (R. 103-105).

II.

JURISDICTION.

Petitioners invoke the jurisdiction of this Court under the Judicial Code, Sec. 237 (b), as amended by the Act of February 13, 1925 [Title 28, U. S. C. A. 344 (b)].

Petitioners, in their brief, have set up and claimed rights, privileges and titles under Title 12, U. S. C., Sec. 207, and Title 12, U. S. C., Sec. 66. Petitioners argue that the Supreme Court of Tennessee, in reversing the decision of the Chancellor, denied to petitioners rights, privileges and titles under said statutes. Respondent denies that there was any title, right or privilege set up or claimed by petitioners under any statute of the United States. The decision of the Supreme Court of Tennessee was based entirely on non-Federal questions. The decision of the Supreme Court of Tennessee was based primarily upon the proposition that the will of Hal S. Harris, under which the then Trustee, S. V. Carter, was purporting to act, vested no authority in the Trustee to enter into the Plan and Agreement for the Reopening of the East Tennessee National Bank, sign the promissory note and pledge collateral of the trust estate as security therefor, and that the Trustee was disqualified from acting on behalf of his trust since the Trustee was acting in a dual capacity, being at the same time an officer and director of the East Tennessee National Bank and the Trustee of the Harris estate (R. 103-105). No Federal question was involved. The Court did not undertake to construe Title 12, U. S. C., Sec. 207, or Title 12, U. S. C., Sec. 66. The only questions involved in the decision were questions of local law, dealing with the construction of the will of a Tennessee resident and the capacity of a Trustee under said will to bind his trust by contract, by pledge and by promissory note. This is not a suit in which the liability for an assessment is contested.

Further consideration of the jurisdiction of the Court will be given in the argument below.

III.

STATEMENT OF THE CASE.

This suit was brought by petitioners in the Chancery Court of Knox County, Tennessee, seeking judgment on a $28,000.00 note executed to petitioners by a former Trustee of the estate of Hal S. Harris, deceased, and for decree subjecting securities attached to said note as collateral security to the satisfaction thereof, and for perpetual injunction prohibiting respondent, Hamilton National Bank, Trustee, from prosecuting a suit in detinue previously brought in the Circuit Court of Knox County, Tennessee, seeking recovery of possession of the securities attached as collateral to said note (R. 1-12). Respondent filed motions, pleas and demurrers which were overruled by the Chancellor. Respondent filed an answer and cross bill wherein it set up all defenses contained in the previous motions, pleas and demurrers, and made a complete answer to all averments of the bill and asked for positive relief. Respondent prayed that the contract entered into by S. V. Carter, former Trustee, referred to in the record as the Plan and Agreement for the Reopening of the East Tennessee National Bank, be declared to be beyond the powers of the Trustee to execute, unlawful and void as to the trust of the respondent, Hamilton National Bank, Trustee; that the note executed by said Carter, Trustee, and sued on in this cause be likewise declared unlawful and void and delivered to respondent for cancellation and destruction; that the attempted pledge of the collateral to said note be declared beyond the powers of the Trustee and the attempt to pledge the same be declared null and void; that petitioners be compelled to return to respondent all the pledged collateral set out and described in the original

bill; that as a matter of law S. V. Carter, former Trustee, was not in position to act impartially and judicially in the transaction whereby he, as Trustee, signed the Reopening Agreement, executed the note and pledged the collateral (R. 25-37, 62).

The parties agreed that the cause might be heard by the Chancellor upon the record and upon the written statement of facts. The written agreement as to the facts was filed as evidence in the cause (R. 26-42). The Chancery Court awarded petitioners a decree as prayed for. From this decree respondent appealed to the Supreme Court of Tennessee, which court, on January 2, 1941, reversed the decree of the Chancery Court of Knox County, Tennessee, and on March 8, 1941, overruled petitioners' petition for rehearing. The Supreme Court of Tennessee sustained the cross bill of this respondent, nullified the action of the former Trustee of the Harris estate in his attempted execution of the reopening contract or agreement, ordered the note returned and canceled and a return of all the collateral securities to this respondent as Trustee of the Harris estate.

STATEMENT OF FACTS.

Hal S. Harris died testate in 1927 and his last will and testament was duly probated in the County Court of Jefferson County, Tennessee. Under the provisions of said last will and testament the estate was placed in trust in the East Tennessee Savings Bank of Knoxville, Tennessee, as Trustee, for the benefit of Nina Harris, wife of the testator, for and during the period of her natural life, with power in her to dispose of the estate by her last will and testament. The East Tennessee Savings Bank qualified as Executor and Trustee and acted in that capacity from early in the year 1927 until the month of August, 1932, at which time said Savings Bank resigned its trust and S. V.

Carter was named as successor Trustee and he duly qualified and acted as Trustee until the date of his death in January, 1935. At the time of his death Hal S. Harris was the owner of 280 shares of the par value of $100.00 each of the capital stock of the East Tennessee National Bank. This stock passed to the Trustee and was held by S. V. Carter, Executor and Trustee, at the time of the failure of the East Tennessee National Bank on January 19, 1933. On or about January 19, 1933, a Receiver was appointed for said bank. On April 5, 1933, the Comptroller of the Currency levied a 100 per cent assessment upon all the stockholders of said East Tennessee National Bank. The assessment was payable May 12, 1933, the stockholders having the privilege of paying 25 per cent May 12, with guaranteed obligation to pay the balance—25 per cent June 12, 1933, 25 per cent July 12, 1933, and the remaining 25 per cent August 12, 1933. A Plan and Agreement for reopening said East Tennessee National Bank was prepared by interested parties and was submitted to the Comptroller of the Currency, who, on April 20, 1933, approved said Plan and Agreement, subject to certain conditions set out in his letter of that date addressed to the Receiver of the East Tennessee National Bank. On May 10, 1933, S. V. Carter, undertaking to act as Trustee under the will of Hal S. Harris, deceased, signed the Reopening Plan and Agreement (found in the record at pages 106-122) and executed a $28,000.00 note to C. H. Baker, M. O. Cowan and Charlton Karns, Trustees under said Reopening Agreement, and delivered to said Trustees certain collateral as security for the payment of said note. The Trustee, S. V. Carter, became connected with the East Tennessee National Bank in 1887, was for many years a Director and Cashier of said bank, and became President of said bank in January, 1926, and finally became Chairman of the Board of Directors, which office he held at the time the

bank went into receivership. S. V. Carter was a substantial stockholder in said bank, and at the time of the bank's receivership he owned 300 shares of stock in said bank of the par value of $100.00 per share. On December 21, 1933, the Comptroller of the Currency declared the Reopening Agreement effective and he revoked the assessment theretofore made against stockholders of said East Tennessee National Bank, both as to the stockholders who signed said Reopening Agreement and those who did not. No stockholder who failed or refused to sign said Reopening Agreement or to execute a note pursuant to the terms thereof had to pay anything on said stock assessment made by the Comptroller of the Currency. All non-signing stockholders who did pay their assessment had their money returned to them by the Receiver and suffered no loss whatever by reason of such stock assessment.

The note which S. V. Carter executed as Trustee matured on January 10, 1940. On January 5, 1940, respondent, Hamilton National Bank, Trustee, which became Trustee of the estate of Hal S. Harris following the death of S. V. Carter in January, 1935, caused demand to be made upon the petitioners for the return of the collateral pledged by said S. V. Carter to the Trustees under the Reopening Agreement. On January 17, 1940, respondent, Hamilton National Bank, Trustee, commenced a suit in the Circuit Court of Knox County, Tennessee, seeking recovery of the collateral from the Trustees under the Reopening Agreement, petitioners herein. On February 9, 1940, this suit was commenced in the Chancery Court of Knox County, Tennessee.

The Supreme Court of Tennessee, in its decision, found it necessary to construe the will of Hal S. Harris. That Court held that the will clearly did not authorize Carter as Trustee to execute the Reopening Agreement, sign the note and pledge the trust assets as collateral thereto. The

Court further held that S. V. Carter as Trustee was disqualified from acting on behalf of his trust, since he was acting in a dual capacity as an officer of the East Tennessee National Bank and as the Trustee of the Harris estate (R. 70-85, 103-105).

IV.

THE QUESTIONS PRESENTED.

Respondent insists that there is no question at all presented by petitioners for determination by this Court. There is no Federal question. Petitioners, under Section III on page 10 of their petition for certiorari, have attempted to state three questions presented to this Court. The first question is entirely inaccurate, in that it assumes that the trust estate had legally consented to the Plan of Reorganization. Such an assumption is entirely unsupported by the facts. The main question in the Tennessee Court was whether the trust estate did, through its Trustee, legally consent to the Plan.

The second question presented by petitioners assumes that entry into the agreement for reorganization was compulsory. The matter of joining in it was purely voluntary with all interested parties. Stockholders could enter into the contract if they wanted to or they could decline if they chose to do so.

The third question presented by petitioners erroneously assumes that a binding and valid note was executed by the trust estate. The Supreme Court of Tennessee has held that the note was a nullity and that the trust estate was not bound by it. The question also erroneously assumes that the execution of the note became an asset of the bank; that because of the note the bank was restored to solvency and the assessment revoked. The note did not become an asset of the bank. The note was a nullity. It did not bind the trust estate. The execution of the note

had nothing to do with the restoration of the bank to solvency. The bank was restored to solvency regardless of the attempted execution of this note by the Trustee of the Harris estate. The assessment against the estate was not revoked because of the note.

The question for decision in the courts of Tennessee was whether the estate of Hal S. Harris, deceased, owning stock in the East Tennessee National Bank, was liable to the Trustees under the Plan and Agreement for Reopening the East Tennessee National Bank on a promissory note executed by a former Trustee of the estate who had no power, authority or capacity under the trust instrument to obligate his estate to the reopening agreement, and on a promissory note and by pledge of collateral belonging to the estate to secure the note. The Supreme Court of Tennessee held that the trust estate was not bound by the promissory note because the Trustee's attempted execution thereof was without authority under the will and contrary to law.

V.

ARGUMENT.

1.

There being no substantial Federal question, the petition for writ of certiorari should be denied for want of jurisdiction. The decision of the Supreme Court of Tennessee was based on non-Federal questions. In dismissing the petition to rehear, the Supreme Court of Tennessee said:

> "However, the decision was rested upon two propositions, chiefly, (1), sustaining the fifth assignment, that the will vested no authority in this Trustee to enter into this obligation; and, (2), sustaining the twelfth assignment, that the Trustee, under all the circumstances set forth, was manifestly disqualified from acting on behalf of his trust, and this without regard to whether or not he acted in good faith."

Petitioners claimed no right, title or privilege under Federal statutes in the courts of Tennessee. The Plan and Agreement for Reopening the East Tennessee National Bank involved the making of a new and distinct debt and obligation upon those stockholders of the bank who desired to enter into the Plan. No stockholder was compelled to join therein (R. 106-122).

The Bank Conservation Act, Title 12, U. S. C., Sec. 207, contains no provision compelling stockholders, creditors or depositors to enter into any proposed reopening contract and there is no law, either state or Federal, which makes it compulsory on a stockholder, whether he be an individual or an estate of a deceased person, to enter into any such contract or to execute a note pursuant thereto, or to pledge collateral as security to said note. Certainly it cannot be effectively argued that a trust estate would be bound to pay the amount of the note and suffer a subjection of

the trust assets to the satisfaction thereof when such trust estate did not actually enter into the reopening contract, execute the note and pledge the collateral.

Respondent does not question the authority of **Easton v. Iowa, 188 U. S. 220, 47 L. ed. 452.** That case simply holds that, so far as the statutes of the State of Iowa attempt to prohibit national banks from receiving deposits when insolvent, those statutes are invalid because they conflict directly with the Federal statutes. Neither does respondent question the authority of any other case or Federal statute cited under the first paragraph of petitioners' argument on pages 18, 19 and 20 of their brief. Those cases clearly are not in point. This suit does not involve the question of liability of a trust estate for an assessment made by the Comptroller of the Currency on stockholders of a national bank.

The capacity of parties to make contracts, execute notes and pledge collateral is determined by local law. There is no Federal common law.

Erie R. Co. v. Tompkins, 304 U. S. 64, 82 L. ed. 1188.

The decision by a state court as to the rights of a national bank as to interest under a state statute, which merely determines the meaning of the state law as applied to all the creditors without denying equality of right to the bank or any right given by a Federal statute, does not present a Federal question.

Union National Bank of Chicago v. Louisville, New Albany & Chicago Ry. Co., 163 U. S. 325, 41 L. ed. 177.

2.

Respondent insists that a construction of the will under which Carter as Trustee was purporting to act was purely

for the courts of Tennessee. Respondent further insists that the question of authority and power of Carter, Trustee, under the will was for determination by the courts of Tennessee according to the local law. The question concerned the power and authority of a Trustee to bind his estate by contract, by promissory note, and pledge of securities belonging to the estate. In **First National Bank v. Kentucky, 76 U. S. 362, 19 L. ed. 701,** it is said of national banks:

> "They are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the Nation. All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on State law."

In **McClellan v. Chipman, 164 U. S. 347, 41 L. ed. 461, 466,** it is said:

> "Of course, in the broadest sense, any limitation by a state on the making of contracts is a restraint upon the power of a national bank within the state to make such contracts; but the question which we determine is whether it is such a regulation as violates the act of Congress. As well might it be contended that any contract made by a national bank within a state in violation of the state laws on the subject of minority or coverture, was valid because such state laws were in conflict with the act of Congress or impaired the power of the bank to perform its functions. Indeed, reduced to its last analysis, the position here assumed by the plaintiff in error amounts to the assertion that national banks in virtue of the act of Congress are entirely removed, as to all their contracts, from any and every control by the state law. The argument that the concession of a right on the part of a state to forbid the taking of real estate by a national

bank for an antecedent debt, under any circumstances, implies the existence of a power in the state to forbid such taking in all cases, begs the question, and amounts simply to a restatement of the proposition already answered."

A controversy as to who holds the equitable title of stock in a national bank involves no Federal question.

Levson v. Davis, 170 U. S. 36, 42 L. ed. 939.

It has never been contended by anyone that the capacity of infants, insane persons and trustees is governed by any law other than the local law. Certainly the Bank Conservation Act (Title 12, U. S. C. 207) does not purport to legislate concerning the powers, authority and capacity of a trustee to enter into an agreement for the reorganization of a bank, execute promissory notes and pledge collateral where, under the local law and under the trust instrument, the trustee has no such power, authority or capacity.

Petitioners have stated that the "binding effect of a reorganization of an insolvent national bank" was called into question in this case. Respondent has made no attack on the validity of the reorganization of the East Tennessee National Bank. Certainly petitioners themselves, purporting to act under said reorganization, have not questioned its validity. Thus this case does not question the validity of a Federal statute nor the reorganization of a national bank under a Federal statute.

3.

Respondent denies that the trust estate "invoked a Federal law" to secure the reorganization of a national bank by which the bank was restored to solvency and an assessment of 100 per cent standing against the trust estate was

revoked as is charged by petitioners in the third paragraph of their argument. S. V. Carter, Trustee, had no power, authority or capacity to enter into a contract, to execute a note or pledge collateral of his trust. The will under which he purported to act did not give him power, authority or capacity. His acts were ineffectual as far as binding his estate was concerned. Thus, the **trust estate**, not being represented by a Trustee with capacity to bind it, invoked no law and did nothing with reference to the reorganization of the East Tennesseee National Bank.

It is true that the trust estate was the owner of stock in a national bank. Whether the trust estate was liable on the assessment made by the Comptroller of the Currency is not material here, for the reason that the assessment against all stockholders, **including those who did not sign the Reopening Agreement**, was revoked by the Comptroller of the Currency and those stockholders who did not sign the Reopening Agreement suffered no loss whatever on account of the assessment. Those stockholders who refused to sign and who paid the assessment had their money returned to them (R. 40).

Thus it is seen that the trust estate received no benefit from the reorganization of the bank. Petitioners have suggested that the recent case of **Deitrick v. Greaney, 309 U. S. 190, 84 L. Ed. 694**, is in point. That case has no bearing at all on the issues involved here. That case involved the right of a receiver of a national bank to compel payment of the promissory note knowingly given to the bank by one of its Directors as a substitute, among its assets, for shares of its own stock purchased and retained by it in violation of the provisions of the National Bank Act, with the bank's officers participating in the illegal transaction. The transaction was a violation of Rev. Stat., Sec. 5201, 12 U. S. C. A., Sec. 83. The note was a consequence of the illegal transaction. The statute precludes resort to the very acts

which it condemns as the means of thwarting those purposes of the act. The extent and nature of the legal consequences of the acts condemned as unlawful by the National Bank Act are to be derived from the National Bank Act. Here, in the present case, there is no controversy concerning "legal consequences which flow from acts condemned as unlawful by the National Bank Act." Respondent has not questioned the validity of the reorganization of the East Tennessee National Bank. There has been no contention by petitioners that respondent or its estate has committed an act condemned as unlawful by the National Bank Act.

4.

Respondent denies that the Supreme Court of Tennessee has discriminated against a national bank, its stockholders and creditors. Petitioners have suggested that the case of **Young v. Phillips, 170 Tenn. 169,** shows discrimination. The facts of that case are wholly dissimiliar to the facts of the present case and the Supreme Court of Tennessee, in its opinion in the present case, clearly distinguished Young v. Phillips, supra.

VI.

CONCLUSION.

We have shown that this Court has no jurisdiction, there being no Federal question involved. The Supreme Court of Tennessee denied no right, privilege or title under Federal statute. The decision of the Supreme Court of Tennessee was based entirely on substantial non-Federal questions involving the construction of a will and the power, authority and capacity of the testamentary trustee to bind his trust by entering into a new and distinct obligation.

The decision of the highest court of Pennsylvania upon the question, whether Pennsylvania testamentary trustees

could invest trust funds in corporate securities, was binding on the Circuit Court of Appeals.

> **Mitchell v. Ottinger, 105 Fed. (2d) 334** (Certiorari denied by Supreme Court, 308 U. S. 591, 84 L. ed. 495).

Since this case does not involve the liability of a trust estate for an assessment made by the Comptroller of the Currency, the case of **Seabury v. Green, 294 U. S. 164, 79 L. ed. 834**, and other similar cases cited by petitioners have no bearing on the issues in this case. Even in cases involving liability for assessments it has been held that the trust estate is not liable where the Trustee, without authority, invested in national bank stock. (See **Williams v. Cobb, 219 Fed. 633**, affirmed without discussion of this point in 242 U. S. 307, 61 L. ed. 325; **Bagnell v. Ives, 184 Fed. 466.**) However, those cases are also immaterial. The liability for an assessment is imposed by Federal statute. Obligations imposed by a promissory note are contractual. Contractual liability is governed by local law in the absence of a controlling Federal statute.

The failure of the Harris estate as a stockholder in the East Tennessee National Bank validly to execute the Reopening Agreement did not prevent the reopening of the bank any more than the failure of many more stockholders to enter into the reopening contract, and the attempted entry into the reopening contract by the Trustee of the Harris estate put the Harris estate in no different attitude from that of many other stockholders who failed to execute the Reopening Agreement. Certainly petitioners would not claim that any one of the many stockholders who failed to enter into the Reopening Agreement is charged with any liability thereunder, such as the obligation of a promissory note or the pledge of collateral to secure such

a note. To do so would be contrary to the agreement as to the facts (R. 40, XXIII).

When the Reopening Agreement was proposed by interested parties the estate of Hal S. Harris, deceased, was an inanimate thing. It was not a legal person. An estate is not a legal entity. It can act only through persons authorized and empowered to act for it. To bind the estate by contract or by promissory note, some one capable of representing the estate with authority and power to make the contract and execute the note must act for the estate, else the estate is not bound. Certainly the estate of Hal S. Harris cannot be penalized by the unauthorized act of one incapable of binding it.

For the reasons stated, respondent respectfully insists that the petition for writ of certiorari should be denied.

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